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Are Company Consultants Potential New Targets for Liquidators?

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Abstract
It is acknowledged that 'it is increasingly common for a wide range of corporate functions to be performed by consultants or other contractors who are not strictly "employees"'. 1 Consultants and business advisers (hereinafter referred to as 'consultants') may need to tread carefully when providing their services to corporate clients. If consultants participate in the making of decisions that affect a substantial part of a corporation's business, they will fall within the statutory definition of 'senior manager' and 'officer' pursuant to s 9 of the Corporations Act 2001 (Cth) (Corporations Act). These consultants, therefore, would become subject to duties imposed by the Common Law2 and the Corporations Act3 upon company senior managers. However, these consultants would not be subject to the significant statutory duty to prevent insolvent trading4 as this duty only applies to parties who fall within the statutory definition of 'director' under s 9 of the Corporations Act. This article provides the first detailed examination of the potential risk to consultants who provide services to corporate clients of falling within the statutory definition of 'de facto director' pursuant to s 9 of the Corporations Act. Consultants at risk of de facto director status of corporate clients in financial crisis may become attractive new targets for liquidators. There have been numerous cases in Australia and the United Kingdom dealing with the issue of de facto director status. However, in only a small number of cases, have consultants been subject to claims of de facto director status. This article sets out the statutory definition of de facto director and briefly discusses issues concerning the burden of proof of establishing that a party falls within the statutory definition of de facto director. It then provides an examination of specific topics to clarify whether they are key indicators of risk of de facto director status. As part of this examination the article provides a review of the limited case authorities in Australia and the United Kingdom where consultants have been subject to claims of de facto director status. Finally, a summary of key findings is provided in the conclusion.

ARE COMPANY CONSULTANTS POTENTIAL NEW TARGETS FOR LIQUIDATORS?

MARTIN MARKOVIC*

Introduction

It is acknowledged that 'it is increasingly common for a wide range of corporate functions to be performed by consultants or other contractors who are not strictly "employees"'. [1] Consultants and business advisers (hereinafter referred to as 'consultants') may need to tread carefully when providing their services to corporate clients. If consultants participate in the making of decisions that affect a substantial part of a corporation's business, they will fall within the statutory definition of 'senior manager' and 'officer' pursuant to s 9 of the *Corporations Act 2001* (Cth) (*Corporations Act).* These consultants, therefore, would become subject to duties imposed by the Common Law[2] and the *Corporations Act*[3] upon company senior managers. However, these consultants would not be subject to the significant statutory duty to prevent insolvent trading[4] as this duty only applies to parties who fall within the statutory definition of 'director' under s 9 of the *Corporations Act.* This article provides the first detailed examination of the potential risk to consultants who provide services to corporate clients of falling within the statutory definition of 'de facto director' pursuant to s 9 of the *Corporations Act.* Consultants at risk of de facto director status of corporate clients in financial crisis may become attractive new targets for liquidators. There have been numerous cases in Australia and the United Kingdom dealing with the issue of de facto director status. However, in only a small number of cases, have consultants been subject to claims of de facto director status. This article sets out the statutory definition of de facto director and briefly discusses issues concerning the burden of proof of establishing that a party falls within the statutory definition of de facto director. It then provides an examination of specific

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1 See Corporate Duties Below Board Level Discussion Paper, May 2005, Corporations and Markets Advisory Committee at p21 citing HIH Royal Commission Report, The Failure of HIH Insurance (April 2003).

2 *Green v Bestobell Industries Pty Ltd* (1982) WAR 1.

3 *Corporations Act 2001* (Cth) ss 180-184.

4 *Corporations Act 2001* (Cth) s 588G.

topics to clarify whether they are key indicators of risk of de facto director status. As part of this examination the article provides a review of the limited case authorities in Australia and the United Kingdom where consultants have been subject to claims of de facto director status. Finally, a summary of key findings is provided in the conclusion.

Statutory Definition of De Facto Director

Pursuant to s 9 of the *Corporations Act*[5] 'director' is defined as:

> Unless a contrary intention appears: …
>
> 'director' of a company or other body means:
>
> (a) a person who:
>
> (i) is appointed to the position of director; or
>
> (ii) is appointed to the position of alternate director and is acting in that capacity;
>
> (b) unless the contrary intention appears, a person who is not validly appointed as a director if:
>
> (i) they act in the position of a director; or
>
> (ii) the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes.
>
> Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body;

The statutory definition of 'director' has the following Note:

> Note: Paragraph (b) – Contrary intention – Examples of provision for which a person referred to in paragraph (b) would not be included in the term "director" are:
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> - section 249C (power to call meetings of a company's members)
> - subsection 251A(3) (signing minutes of meetings)

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[5] Note the contrast to pursuant s 22(5) of the *Companies Act 1986* (UK) "Director includes any person occupying the position of a director, by whatever name called and includes a shadow director."

- section 205B (notice to ASIC of change of address).

The above 'Note Paragraph (b)' are examples of where parties falling within the de facto and shadow director category would not be included as a director. This is consistent with the comments by Browne-Wilkinson VC in *Re Lo-Line Electric Motors Ltd* in reference to the definition of director in the *Companies Act 1985* (UK):

> Since the definition of director is inclusive and not exhaustive its meaning has to be derived from the words of the Act as a whole. In my judgment it is not possible to treat a de facto director as a 'director' for all purposes in the 1985 Act. Thus in ss 282 (minimum number of directors) 291 (directors' share qualification) 293(2) (age limits) and 288 (register of directors) the word director must be referring to the de jure directors alone. On the other hand, in some sections the word director must include a person who is not a de jure director. Thus s 285 validates acts of a director notwithstanding a defect in his/her appointment ie the acts of someone who is not a de jure director.
>
> It follows that the word directors is capable of including de facto directors but may not do so. The meaning of director varies according to the context in which it is to be found.[6]

'The "term" director is defined in s 9 [*Corporations Act*] to include "de facto" and "shadow directors"'[7] It is widely acknowledged that pursuant to s 9(b)(ii) the words 'the directors of the company or body are accustomed to act in accordance with the person's instructions or wishes' have attracted the label 'shadow directors'.[8] Parties who 'act in the position of a director' pursuant to sub paragraph (b)(i) of the s 9 definition of director have attracted the description 'de facto director'.[9] The phrase 'de facto director' has a long history. Jessel M. R. commented in *Re Canadian Land Reclaiming and Colonizing Co*:

> No doubt they were not properly elected, and were, therefore, not *de jure* directors of the company; but that they were *de facto* directors of the company is equally beyond all question.[10]

Notwithstanding this long history '[t]he authorities are not entirely consistent in defining a de facto director. The critical issue, and the jurisprudential difficulty, is to

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6 (1988) 4 BCR 415 at 421-2.

7 HAJ Ford, RP Austin and IM Ramsey, *Ford's Principles of Corporations Law* (12th ed, Butterworths, 2005) 331.

8 See M Markovic "The Law of Shadow Directorships" (1996) 6 *Aust Jnl of Corp Law* 323.

9 Ford, above n 7, p331 acknowledge "[t]he term director is defined in s 9 [*Corporations Act*] to include 'de facto' … directors'".

10 (1880) 14 Ch D 660 at 664.

distinguish a de facto director from someone who acts for, or otherwise in the interests of, a company but is never more than, for example, a mere agent, employee or adviser.'[11]

Burden of Proof

It is clear that there is a significant difference in the approach taken by courts between, on the one hand, establishing a serious question to be tried with respect to de facto director status and, on the other hand, establishing that a party falls within the statutory definition of de facto director. It seems to be relatively easy to establish a serious question to be tried. In *Multan Pty Ltd v Ippoliti*[12] Simmonds J of the Supreme Court of Western Australia concluded there was a serious question to be tried as to whether a party acted as a de facto director after she resigned as director on the basis of the following scant evidence:

- 'signing the contract of sale to her son of the Albany Property'[13]
- 'communicating with the plaintiff's bank for the discharge of its mortgage over the property'[14]
- 'communicating with the plaintiff's accountants in relation to the lodgement of the plaintiff's annual returns and preparation of its tax returns'.[15]

In contrast, to establish that a party falls within the statutory definition of de facto director, the burden of proof is a balance of probabilities. French J of the Federal Court in *ASIC, In the Matter of Richstar Enterprises Pty Ltd v Carey (No5)* stated that 'clear and cogent evidence should be required'[16] before acceptance of contention of de facto director status.

Risk Indicators of De Facto Status

How can consultants be at any risk of de facto director status? They are consultants after all and have never been appointed as directors. What then is required to establish that consultants may be at any risk of de facto director status? The ambit of the statutory definition of de facto director remains uncertain. Madgwick J in *Deputy*

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11 *Secretary of State for Trade & Industry v Hollier & Ors* [2006] EWHC 1804 (Ch) at para 64.
12 [2006] WASC 130.
13 Ibid para 25.
14 Ibid.
15 Ibid.
16 [2006] FCA 684 (1 June, 2006) at para 54.

Commissioner of Taxation v Austin succinctly highlighted the difficulty of articulating a general statement as follows:

> The variety of commercial and corporate life is such that it seems to me unprofitable to attempt a general statement as to what is meant by 'acting as a director'. Whether a person does so act will often be a question of degree, and requires a consideration of the duties performed by that person in the context of the operations and circumstances of the particular company concerned.[17]

In what circumstances will consultants be at any risk of falling within the statutory definition of de facto director? The following topics are examined to clarify whether they are key indicators of risk of de facto director status for consultants:

- Performance of top level management functions
- Board delegation of management powers
- Performance of specific functions vis a vis general functions
- Period of time
- Intention to be a director
- Holding out as a director
- Rendering assistance as a consultant after resigning as a director

Performance of top level management functions

Consultants engaged to perform functions normally undertaken by management below board level are clearly not at risk of de facto director status. Madgwick J in *Deputy Commissioner of Taxation v Austin* highlighted that 'it seems to be a necessary condition of acting as a director, whether properly appointed or not, that one exercises what might be called the actual (and statutorily extended) top level of management functions'.[18] What constitutes 'actual (and statutorily extended) top level management functions'? Millett J in *Hydrodam (Corby) Ltd* stated:

> To establish that a person was a de facto director of a company it is necessary to plead and prove that he undertook functions in relation to the company which could properly be discharged only by a director.[19]

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17 (1998) 16 ACLC 1555 at 1,559.

18 Ibid.

19 [1994] 2 BCLC 180 at 183.

As such, consultants who perform of 'top level management functions' which are normally performed only by a director may be at risk of falling within the statutory definition of de facto director.

Whether a consultant performed top level management functions was a critical issue in *Natcomp Technology Australia Pty Limited v Graiche*.[20] A detailed examination of this intriguing and unusual case is warranted. Graiche was a medical practitioner. Natcomp Technology Australia Pty Ltd ('Natcomp') commenced a civil action alleging that Graiche was a de facto (or shadow) director of Amtech Industries Pty Ltd ('Amtech'), a computing software company. Natcomp, a creditor of Amtech, sought to make Graiche personally liable for debts incurred by Amtech under the insolvent trading provisions pursuant to the *Corporations Law*. Although Graiche was a medical practitioner he had an interest in computer technology. After purchasing some computing products from Amtech for his medical practice, Griache developed a close association with Amtech and was subsequently described by Amtech as a 'business adviser'.

At first instance, Hogan J of the New South Wales District Court held that Graiche was not a de facto director 'considering the limited nature of the respondent's involvement in Amtech, the lack of authorisation for representations made in his absence, and the absence of evidence that Dr Graiche ever asserted that he was a director'.[21] The appeal by Natcomp to the New South Wales Court of Appeal was based on grounds including 'error on the part of the trial judge for failing to hold the respondent was a director'.[22] The following arguments were presented in support of the assertion that Graiche was a de facto director of Amtech:

- First, Graiche provided financial assistance to Amtech by way of a loan. The reason why Graiche provided the loan was not made clear. The inference presumably is that the loan supports the view that Graiche developed a close association with Amtech whereby he provided financial assistance to Amtech. This is, therefore, clearly beyond a normal company and business adviser relationship. However, the loan was not a significant amount and is not strong evidence in support of de facto director status.

- Secondly, Gentil, a director of Amtech made representations to the managing director of Natcomp 'to the effect that Dr Graiche was an integral aspect of the running of Amtech'.[23] At first blush, this statement looks like solid evidence against Graiche. However, Stein

[20] (2001) 19 ACLC 1,117.

[21] Ibid 1,118.

[22] Ibid.

[23] Ibid.

JA held that '[T]hese representations were made as to the financial support of the respondent for the company'.[24] It was unfortunate that this issue was not pursued or clarified by his Honour considering that the amount of financial assistance given by Graiche to Amtech was not significant and was provided only for a short period of time. It is, therefore, difficult to reconcile Gentil's statement that Graiche played 'an integral aspect of the running of Amtech' with the finding by Stein JA that this statement referred to Graiche's financial support to Natcomp which, as stated, was not significant and provided only for a short time.

- Thirdly, evidence that Graiche associated himself closely with Amtech included 'frequent use [by Graiche to Grassia, the managing director of Natcomp, at a trade fair in Taiwan] of the term "we at Amtech", when discussing the potential of Amtech to build a strong trading relationship with [Natcomp]'.[25] Graiche 'informed Mr Grassia that he was present at the trade fair as a representative of Amtec'.[26] 'At a dinner held during the fair [Graiche] distributed a business card which carries a logo of "Amtech", the company's address and described Dr Graiche as the "CEO" of the company, no doubt intended to mean "Chief Executive Officer".'[27] Graiche 'sought to justify the distribution of the business cards as necessary to obtain technical information at trade fairs for his own purposes, as his medical cards would not be useful in dealing with exhibitors. He claimed that he never intended to use the cards nor did use them, to present himself as a representative of Amtech for commercial purposes'.[28]

- Fourthly, Graiche in a number of commercial settings made statements that 'he was partners with Mr Le Gentil [a director of Amtech]… [and] …he was the person who made the decisions at Amtech'.[29]

- Fifthly, 'Graiche collected computer equipment ordered by Amtech and paid for it in cash. During the transaction the respondent stated to a Mr Agamalis that he had a financial interest in Amtech".[30] Graiche 'was also involved in the conduct of a television advertising

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24 Ibid.
25 Ibid.
26 Ibid.
27 Ibid.
28 Ibid.
29 Ibid.
30 Ibid 1,119.

> campaign for Amtech'.[31] Meetings regarding this campaign with the account manager of the advertising agency, the directors of Amtech and Graiche were held at an office above Graiche's medical practice. Graiche 'was introduced as the company's business adviser, who in addition to providing business advice had contributed financially to Amtech … [Graiche] played an active role in the meeting with respect to the acquisition and marketing of a new product'.[32]

Stein JA held that Amtech's principal business was the sale of computer packages and there was 'no evidence that the respondent [Graiche] was involved in any fashion in this principal aspect of the company's business, nor in its day-to-day operations. Dr Graiche's involvement with Amtech was, it appears, limited to an interest in the development and marketing of possible new products'.[33] Stein JA made several detailed references to the decision by Madgwick J in *Deputy Commissioner of Taxation v Austin*[34] including '[t]hus it seems a necessary condition of acting as a director…that one exercises what might be called the actual (and statutorily extended) top level of management functions'.[35] Stein JA also referred to the following views expressed by Madgwick J with respect to 'the conduct and circumstances which may be considered when determining whether a person's actions fall within'[36] the statutory definition of de facto director:

> If, in the case of a small company, a person has, with full discretion, "acted as the company" in relation to matters of great importance to the company, and other than as an arms length expert engaged for a limited purpose, the conclusion that the person has acted in the capacity of a director may well be justified.[37]

After citing Madwick's J views, Stein JA commented:

> The involvement of Dr. Graiche in the affairs of Amtech must be examined in the context of the overall nature of the company's business…The trial judge

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31 Ibid.

32 Ibid.

33 Ibid 1,120.

34 (1998) 16 ACLC 1,555.

35 (2001) 19 ACLC 1,117 at 1,119.

36 Ibid.

37 Ibid.

> found that Amtech "was not a large corporation .. [it] was effectively a two-man company".[38]

A critical fact to Stein's JA finding:

> There was no evidence that [Graiche] was involved in any fashion in this principal aspect of the company's business, nor in its day-to-operations. Dr Graiche's involvement with Amtech was, it appears, limited to an interest in the development and marketing of possible new products.[39]

Stein JA (with whom Spigelman CJ agreed) and Heydon JA held that the respondent had failed to establish that Graiche was a de facto director.

Some further comments regarding this unusual case are warranted. First, although described by Amtech as a 'business adviser', it may be argued that Graiche could not be regarded as 'an arms length expert engaged for a limited purpose'. He was a medical practitioner after all who merely had 'an active interest in computer technology'. [40] In other words, he was not an expert in computer technology. Secondly, he clearly was involved in what may be argued were two key strategic areas in Amtech's business, namely, the development and the marketing of new products. Thirdly, it is of interest to note that at first instance and on appeal, the courts held in favour of Graiche notwithstanding both courts questioned the veracity of most of his statements. Stein JA commented:

> In the District Court Acting Judge Hogan accepted, for the most part, the evidence adduced on behalf of the appellant company [Natcomp] and rejected that of the respondent [Graiche]. Nevertheless, his Honour [Hogan AJ] found that the case under the *Corporations Law* was not proven.[41]

Similarly, the following statement by Heydon JA:

> The evidence received by the trial judge, particularly the evidence which the respondent medical practitioner gave in cross examination, reveals that his approach to his legal and ethical responsibilities as a person involved in trade, as a litigant preparing to answer interrogatories, and as a witness, was entirely unsatisfactory. The trial judge in effect so found … The trial judge found that, despite the respondent's sworn denials, he made a series of out-of-court statements suggesting a close connection between himself and Armtech Industries Pty Ltd. The trial judge found in large measure those statements

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38 Ibid 1,120.

39 Ibid.

40 Ibid 1,118.

41 Ibid.

> were false…there was in fact no evidence that the trial judge's conclusions were wrong.[42]

As stated, this was an unusual case. Not only did the New South Wales Court of Appeal hold that Graiche lied when he denied he made certain statements with respect to his close involvement in Amtech, the court also held that when Graiche made the particular statements in question, he was also lying as to his involvement in Amtech. It may be argued that the result of the case was surprising in light of the following:

- District Court Acting Judge Hogan's rejection of the respondent's evidence
- Evidence that Graiche played a key role in the development and marketing of new products
- Evidence that Graiche held himself out as the 'CEO' via business cards
- Evidence of a number of statements made by Graiche to third parties that 'he was the person who made the decisions at Amtech'

Others have also expressed some surprise at the result of this case.[43] Clearly the fact that Graiche's involvement in the company was limited to the development and marketing of new products was a critical fact influencing the court's decision. Notwithstanding that intention is not a necessary element to be a de facto director, it is unfortunate that the premise behind Graiche's close association with Amtech was not made clearer. Merely having an interest in software packages for his medical practice seems to be the sole basis for Graiche developing such a close relationship with Amtech whereby he assisted the company not only in the development and marketing of new products, but also in lending the company an amount of money. *Natcomp's* case affirms the reluctance of some courts to find that a party involved in a small company falls within the statutory definition of de facto director unless there is clear and cogent evidence of involvement in a wide range of top level management matters.

Board delegation of top level management functions

Although the exercise of top level management functions 'which could be properly discharged only by a director'[44] was recognised as a necessary condition for de facto director status, Madgwick J in *Deputy Commissioner of Taxation v Austin*

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42 Ibid 1,120.

43 See B Collier "Identification of De Facto and Shadow Directors Easier Said Than Done" (2001) 19 *Company and Securities Law Journal* 340.

44 *Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 at 183.

acknowledged, '[h]owever, that is not necessarily a sufficient condition for such a conclusion, nor is it the same as saying that one must do things which only a director can do'.[45] Performance of top level management functions by a consultant is, therefore, not sufficient by itself to find a consultant falls with the statutory definition of de facto director. This position recognises that while a board may determine policy and strategic direction of companies, senior management, particularly in major companies, frequently make significant management decisions within a board's set policy and strategic directions. 'In a large and diversified company, great discretion to deal with very important matters must be reposed to employees.'[46] A board's power of delegation is set out pursuant to s 198D(1) of the *Corporations Act* as follows:

> Unless the company's constitution provides otherwise, the directors of a company may delegate any of their powers to:
>
> a) a committee of directors; or
>
> b) a director; or
>
> c) an employee of the company; or
>
> d) any other person.

Delegation by the board to consultants would be covered by sub paragraph (d) of s 198D(1). Consultants who perform a wide range of top level management functions to corporate clients may be relieved by the following statement by Madgwick J with respect to directors' power to delegate:

> Directors are, of course, subject to the *Law* [*Corporations Act*] and the company's articles [constitution], entitled to delegate their powers and functions to other officers or employees of a company: In case of a large company, this would appear inevitable. But that is not to say that those others necessarily then act in the capacity of a director (nor that a director who has delegated a substantial part of his or her authority ceases to act in that capacity).[47]

It is, therefore, acknowledged that in large companies, delegation by the board of a range of top level management functions which are normally performed by directors is a necessity. Consultants engaged by major corporations to perform top level management functions may, therefore, be at little risk of de facto director status as the court regards this delegation of power as 'inevitable'. However, it is submitted

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45 (1998) 16 ACLC 1,555 at 1,559.

46 Ibid.

47 Ibid.

that this may very well not be the situation in smaller companies who engage consultants to perform a wide range of top level management functions which would normally be expected to be performed by the board. For example, an engineer who is the sole director of a small engineering company may delegate a wide range of top level management matters to a consultant. The consultant may have delegated power to:

- hire and fire staff;
- negotiate and finalise major contractual sales;
- negotiate and finalise payments to trade creditors;
- negotiate and finalise arrangements with lending institutions.

It is submitted that this consultant would be at risk of de facto director status as the consultant is clearly performing the functions expected of a director in a small company, notwithstanding that these powers have been delegated to the consultant by the corporate client. We await judicial guidance on this critical issue.

How can consultants minimise their risk of de facto director status when they have been granted wide discretion by a corporate client with respect to top level management functions? It is submitted that it is vital that consultants provides their recommendations to the corporate client (albeit the board or managing director) and receive clear approval before proceeding with the matters they have recommended. The following comment by Cooke J in *Secretary for Trade and Industry v Elms* succinctly highlights how important it is for consultants not to be seen as part of the client company's governing structure:

> It is not I think in any way a question of equality of power but equality of ability to participate in the notional board room. Is he somebody who is simply advising and, as it were, withdrawing having advised, or somebody who joins with the other directors, de facto or de jure, in decisions which affect the future of the company?[48]

If consultants participate in the decision making process of top level management functions of the client company, rather than merely providing their advice and withdrawing, then the consultants are at risk of being regarded as part of the corporate governing structure of the client company, and therefore, clearly at risk of de facto director status.

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[48] Unreported, 16 January 1997, cited in *Secretary of State for Trade and Industry v Hollier & Ors* [2006] EWHC 1804 (Ch) at para 70.

Performance of specific functions vis a vis general functions

Does the extent of a consultant's involvement in a client's business become a critical fact with respect to the risk of de facto director status? In other words, does it matter whether a consultant is engaged to provide specific management functions, or alternatively, is engaged to offer assistance to the company in a wide range of management functions? This issue was canvassed in *Naomi Marble & Granite P/L v FAI & All Risks Management P/L.*[49] Shepherdson J of the Queensland Supreme Court had to resolve whether Edward Morales (Morales) was a consultant or de facto director of Naomi Marble and Granite P/L (Naomi). There was no direct evidence that Morales had been appointed a director. Shepherdson J held that Morales was a de facto director. The decisive facts which his Honour listed included:

> … Morales effectively had complete control over the bank accounts of the plaintiff in that because of his unimpeded and unlimited access to the signed blank cheques drawn on the plaintiff's accounts he could at anytime draw down and exhaust moneys in the plaintiff's bank account including drawing funds from any such account to the extent of any overdraft limit it might have. One would hardly expect someone who was not a properly constituted director of a company to have such control over the company's finances (more particularly closely monitoring the movement of the company's funds and strict control over cheques, vouching each payment by cheque and satisfying himself/herself that such payment was for a proper purpose of the company and the like).[50]

His Honour found that owing to Morale's 'familiarity with the type of business … and Anne Hunter's lack of knowledge of that type of business and the absence of any other person ... who was competent to decide what stock should be purchased from Spain and what prices should be asked on selling that stock in Australia all point to Edward Morales being the real power and driving force behind the plaintiff … on the evidence the first defendant has satisfied me to a very high degree that Edward Morales was a de facto director of the plaintiff … I find Edward Morales was not a consultant'.[51] Shepherdson J found Morales 'did not become overtly involved in the plaintiff's activities on a full time basis'. [52] His Honour acknowledged that a 'consultant is normally engaged to perform specific functions'.[53] Similarly, Davies J in

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49 [1997] QSC 76.

50 Ibid at 99 of 248.

51 Ibid at 103 of 248.

52 Ibid.

53 Ibid.

Mistmorn Pty Ltd (in liq) v Michael Yasseen[54] acknowledged that '[t]he distinction between a consultant to and a director of a corporation is often said to be that the former is engaged to perform specific functions whilst the latter is engaged in the affairs of the corporation generally.'[55] Shepherdson J found that 'Morales was engaged in the affairs of the plaintiff generally'.[56] It is, therefore, important for consultants to recognise that their risk of de facto director status may increase the wider their terms of engagement with respect to the affairs of the client company. That is not to say that consultants are at no risk of de facto director status if they restrict themselves to providing certain specific management functions to a client company. To be at risk, the consultant's participation does not have to relate to all key aspects of the company's business. 'A person may be a de facto director even though that person does not have day to day control over the company's affairs and even though he or she acts as a director only in relation to part of the company activities.'[57] The statutory definition of de facto director clearly has potentially a wide ambit. However, as discussed, the risk of de facto director status can be minimised provided the consultant merely provides their recommendations on actions to be taken by the corporate client and leaves it to the client company's governing structure to make the final decision.

Period of time

Is the period of time which a consultant provides their services to a corporate client an important factor with respect to the possible risk of de facto director status? Madgwick J commented in *Deputy Commissioner of Taxation v Austin* that in 'acting in the position of [director] … there is an element of some degree of continuity inherent'.[58] Consultants who provide their services for a limited time would, therefore, seem to be at less risk compared to consultants who perform top level management functions over an extended period of time. Madgwick J further commented that the 'length of time he so acted puts the matter beyond the realm where it could be said that, because of an informal act of assistance, he was not 'occupying or acting in the position of' a director'.[59] The nature of consulting services (ie are they top level management functions) and the length of time that a consultant renders these services to a corporate client are, therefore, critical factors in

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54 (1996) 14 ACLC 1,387.

55 Ibid 1,395.

56 [1997] QSC 76 at 98 of 248.

57 *Secretary for Trade and Industry v Elms* unreported, 16 January 1997, cited in *Secretary for Trade and Industry v Hollier & Ors* [2006] EWHC 1804 (Ch) at para at 73.

58 (1996) 16 ACLC 1,555 at 1,560.

59 Ibid.

determining a consultant's risk of attracting de facto director status. Note, however, that consultants may still be at risk of de facto director status notwithstanding they 'did not become overtly involved in the plaintiff's activities on a full time basis'.[60]

Intention to be a director

Does the statutory definition of de facto director require intention as a requisite element? If intention is a requisite element, then this raises two questions:

- First, must the consultant have intended to be a director of the client company to be at any risk of falling within the statutory definition of de facto director?
- Secondly, must the company have intended the consultant to be its director for the consultant to be at any risk of falling within the statutory definition of de facto director?

With respect to the first question, in *Mistmorn Pty Ltd (in liq) v Michael Yasseen*[61] at issue was whether a party who described himself as a consultant fell within the statutory definition of de facto director. Davies J held the consultant to be a de facto director notwithstanding 'he intended not to be a director'.[62] Davies J found the party 'involved himself in the affairs of Mistmorn as only a director of the company would have been expected to do. I do not say that he held himself out to be a director, for, as I have said, I think that he intended not to be a director, but he dealt with the matters one would expect a director to handle'.[63] Mistmorn's case should be a strong warning to consultants who become involved over an extended period of time in key areas of a company's operations which only directors would normally undertake, that notwithstanding they 'intended not to be a director',[64] they run the real risk of de facto director status. Similarly in *Secretary of State for Trade & Industry v Hollier* a party was held to be a de facto director as a result of 'exercising real control and giving instructions over a wide range of Amba's activities'[65] even though his only motivation was to assist his father.

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60 *Naomi Marble & Granite P/L v FAI & All Risks Management P/L* [1997] QSC 76 at p103 of 248. See also in *Mistmorn Pty Ltd (in liq) v Michael Yasseen* (1996) 14 ACLC 1,387 at 1,395 a consultant was held to fall within the statutory definition of de facto director although it was acknowledged that the consultant's "attention to Mistmorn's affairs was not full-time".

61 (1996) 14 ACLC 1,387.

62 Ibid 1,394.

63 Ibid.

64 Ibid.

65 [2006] EWHC 1804 (Ch) at para 174.

With respect to the above second question, if a company did intend a person to be their director, notwithstanding no valid appointment, this intention is evidence in support of de facto directorship status. Examples of this scenario include a defect in a director's appointment or a party inadvertently continuing to act as a director after their term had expired. However, with respect to the second question, at issue is whether it is an essential element of the statutory definition of de facto director that the company must have intended the person to be a director. This issue was resolved in *Deputy Commissioner of Taxation v Austin*[66] when Madgwick J held Austin was a de facto director notwithstanding the absence of any solid evidence that the company intended Austin to be its director.

In conclusion, a consultant may still be at risk of falling within the statutory definition of de facto director, notwithstanding that the consultant and the client company did not intend the consultant to be a director.

Holding out as a director

Must consultants be 'held out' as a director of the client company to be at any risk of falling within the statutory definition of de facto director? This issue of holding out raises two questions:

- First, must the company hold out the consultant as a director for the consultant to be at any risk of falling within the statutory definition of de facto director?
- Secondly, must the consultant hold himself/herself out as a director to be at any risk of falling within the statutory definition of de facto director?

With respect to the first question, Millett J in *Re Hydrodam (Corby) Ltd* stated:

> A de facto director is a person who assumes to act as a director. He is held out as a director by the company, and claims and purports to be a director although never actually or validly appointed as such.[67]

However, in reference to Millett J's above comments, Warner J in *Re Moorgate Metals Ltd* stated:

> Some of the expressions used by Millett J in the Hydrodam case could be construed as meaning that, for a person to be held to have been a de facto director, the label 'director' must have been attached to him. But I am sure that Millett J did not mean that. He was concerned to distinguish between a de facto director and a shadow director, the latter being a person in accordance

[66] (1998) 16 ACLC 1,555.

[67] [1994] 2 BCLC 180 at 183.

> with whose directions or instructions the directors of a company (whether de jure or de facto) are accustomed to act.[68]

Furthermore, Timothy Lloyd QC in *Re Richborough Furniture Ltd* stated:

> If Millett J's formulation in *Re Hydrodam (Corby) Ltd* were correct and exhaustive, Mr Muncaster would not satisfy the test because, apart from minor incidents, he was never held out by Richborough as a director and never claimed or purported to be a director. Moreover it would be difficult to say that there was anything that he did which could not properly have been performed by a manager below board level. However, like Warner J [*Re Moorgate Metals Ltd*], I do not believe that this is an exhaustive statement of the test.[69]

Finally, Etherton J in *Secretary of State for Trade and Industry v Hollier* commenting on Millett's J views stated 'it seems wrong in principle that it is a necessary characteristic of a de facto director that he or she 'is held out as a director by the company'. Such 'holding out' may be important evidence in support of the conclusion that a person has in fact acted as a director, but it would appear to be far too narrow a test to embrace all those who have discharged functions normally and most appropriately carried out by a director'.[70] Consultants, therefore, clearly do not have to be held out by their client company as a director to be at risk of de facto director status.

With respect to the second question, the issue whether a consultant must hold himself/herself out as a director of a client company to be at any risk of de facto director status was raised in *Mistmorn Pty Ltd v Michael Yasseen*. Davies J held Yasseen was a de facto director notwithstanding that 'I do not say that he held himself out to be a director, for, as I have said, I think that he intended not to be a director'.[71] Furthermore, Madgwick J in *Deputy Commissioner of Taxation v Austin* commented:

> [A]n express claim to be a director may, in some cases, be carefully not made. That would not prevent a conclusion, nevertheless, that a person's dealings with third parties points to his or her having acted as a director.[72]

It is therefore submitted that holding out as a director is not to be an essential element of the statutory definition of de facto director. As such, consultants at risk of de facto director status can take little comfort in the argument that they never held

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68 [1995] 1 BCLC 503 at 517.

69 [1995] 1 BCLC 507 at 522.

70 [2006] EWHC 1804 (Ch) at para 66.

71 (1996) 14 ACLC 1,387 at 1,394.

72 (1998) 16 ACLC 1,555 at 1,560.

out themselves out as a director or were never held out by a client company as a director.

Rendering assistance as a consultant after resigning as director

It is not uncommon for a director to resign, and thereafter, render assistance to the company on a consultancy basis. Are these consultants at any risk of de facto director status? This was the situation in the in *Deputy Commissioner of Taxation v Solomon; Deputy Commissioner of Taxation v Muriwai*.[73] The New South Wales Court of Appeal had to resolve whether Solomon and Muriwai were liable as de facto directors to the Commissioner of Taxation for penalty notices, as they were not validly appointed as directors at the relevant times. Solomon and Muriwai were directors of Deemah Marble and Granite Pty Ltd (Deemah) and its wholly owned subsidiaries, Copanat Pty Ltd (Copanat) and Copalock Pty Ltd (Copalock). The three companies operated a single business unit known as the 'Deemah group'. Solomon resigned as director on 12 July 2000 and, thereafter, 'was available in a consultancy capacity to assist Mr Muriwai in his efforts to save the companies'.[74] Gzell J found Solomon's involvement in a consultancy capacity with the Deemah group included daily contact with Mr Muriwai, involvement in a wide range of strategic matters including the sale of the Singapore operations, 'attempts to generate revenue from stone stock sales, his involvement in the preparation of the July 2000 projected cash flows, his involvement with the ATO [Australian Taxation Office] to receive $600,000 in reduction of the group's taxation liabilities and his involvement with the employees of the group'.[75] As a consequence of this involvement, Gzell J held (Handley JA and Sheller JA agreed) that 'Solomon continued to perform the sort of high level non-executive tasks he had undertaken while an appointed director'.[76] Solomon argued that he was in a similar situation to Graiche in the *Natcomp Technology* case, and as such, did not fall within the statutory definition of de facto director. Gzell J rejected this argument on the grounds that 'Graiche was not involved in the company's main activity of retail sale of computer packages, his involvement being limited to the development and marketing of new products. By contrast, Dr Solomon was involved in the main activity of the Deemah group'.[77]

Gzell J furthermore rejected Muriwai's argument, that after his resignation as director, he was 'a senior employee of the companies'. Muriwai admitted that after

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73 [2003] NSWCA 62.

74 Ibid [40].

75 Ibid [47].

76 Ibid.

77 Ibid.

his resignation he 'was performing the same duties (as managing director) because the alternative was that if I was to walk out the door there would be no-one there'.[78] This was a critical admission as his Honour held that 'Mr Muriwai acted as the managing director of the business of the Deemah group. He continued to carry out the same tasks after his resignation. There was no one else'.[79] This case is a strong warning to directors who resign and then continue to perform similar tasks after their resignation on a consultancy basis of the real risk of falling within the statutory definition of de facto director.

Professional Consultants

In all of the above cases discussed, no professionals, such as accountants and insolvency practitioners, were the subject to claims of de facto director claims.[80] Are professionals who are engaged on a consultancy basis and work closely with corporate clients in financial difficulty at any risk of falling within the statutory definition of de facto director? Note that professionals who may be at risk of falling within the statutory definition of de facto director status cannot rely on the following professional exemption provision in the s 9 definition of 'director' of the *Corporations Act*:

> Subparagraph (b)(ii) does not apply merely because the directors act on advice given by the person in the proper performance of functions attaching to the person's professional capacity, or the person's business relationship with the directors or the company or body;

This exemption for professionals only applies to the statutory definition of 'shadow director' pursuant to s 9 sub paragraph (b)(ii) of the *Corporations Act*.

Notwithstanding that there is no Australian precedent where a professional consultant has been held to be a de facto director professionals should not be lured into a false sense of security that they are never at risk of falling within the statutory definition of de facto director. Litigation was commenced in the Western Australian Supreme Court against a chartered accountant engaged by a company on a consultancy basis. It was alleged that the accountant acted as a director of the company (which subsequently went into liquidation). Arguments presented in support of the allegation were as follows:

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78 Ibid [31].

79 Ibid [47].

80 Note that it was not clear in *Secretary of State for Trade and Industry v Jones* [1999] BCC 336 whether the management consultant had professional qualifications.

- the accountant attended board meetings and took part in the decision making at the meetings;
- the accountant identified himself with the company in correspondence;
- the accountant negotiated with the company's bankers and creditors;
- the accountant decided when and which of the company's creditors would be paid.

It must be emphasised that this matter was settled and did not progress to court. Nevertheless, this commencement of litigation proceedings is a warning to professional consultants of the potential risk of de facto director status in circumstances where they are performing functions normally undertaken by the directors of the company.

A further warning to professional consultants is the English case *Re Tasbian Ltd (No 3)*.[81] Nixon, a chartered accountant, who was an experienced company doctor,[82] was initially engaged by a major shareholder and financier of Tasbian Ltd (Tasbian). Nixon was subsequently engaged by Tasbian as a professional adviser. Tasbian subsequently went into receivership. The official receiver's report alleged Nixon was a director (de facto or shadow director) of Tasbian and caused Tasbian to trade while insolvent. It must be emphasized that the court only had to decide whether there was an arguable case that Nixon was a de facto or shadow director. A registrar at first instance and then Vinelott J (Chancery Division (Companies Court)) on appeal held there was an arguable case against Nixon. Balcombe LJ (Court of Appeal), with whom Stuart-Smith LJ and Donaldson MR agreed, dismissed Nixon's appeal in finding Nixon 'for whatever purpose, … was controlling the company's affairs in a manner going beyond the province of a company's professional adviser'.[83] Nixon performed many functions which are usual for company doctors. For example, he negotiated an informal moratorium with trade creditors and monitored Tasbian's trading. However, a critical finding that influenced Balcombe LJ was that Nixon did more than monitor Tasbian's trading. He 'controlled its bank account through the

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81 [1992] BCC 358.

82 A 'company doctor' is a 'specialist business or a management expert who advises companies that have got into financial difficulties on methods of corporate re-organisation so that they may once again become profitable': Butterworths *Business and Law Dictionary* (1997) at p97.

83 [1992] BCC 358 at 364.

bank mandate'.[84] Nixon became a signatory to Tasbian's bank account whereby Balcombe LJ stated:

> Mr Nixon decided which cheques drawn by the company could and which could not be admitted to the bank. This meant that he was concerned with which of the company creditors were paid and in which order, and to that extent it would appear – I say no more than that – that he was able to control the company's affairs. This seems to me to raise an arguable case that he was … a de facto director.[85]

Nixon also recommended adopting a new group structure whereby Tasbian's workforce was transferred to a subsidiary company. One expects management consultants to make strategic recommendations. However, what was critical was that this significant development was implemented by Nixon before he reported to the board recommending the new group structure. *Tasbian's* case should be a warning to company doctors that they need to tread carefully as there may be a fine line between assisting a company in financial difficulty and exposing themselves to the risk of de facto director status. However, it must be emphasised that the court in *Tasbian's* case only had to determine whether there was an arguable case of de facto director status.

A further significant decision for professional consultants and their potential risk of de facto director status was the English case, *Secretary of State for Trade and Industry v Jones*.[86] This case concerned an appeal by the Secretary of State for Trade and Industry (Secretary of State) against a district court's decision to dismiss an application for a disqualification (as director) order against Jones, a management consultant. At issue was whether Jones was a de facto director of Ambery Metal Form Components Ltd (Ambery Ltd) which subsequently failed. Mr and Mrs Ambery were the only appointed directors of Ambery Ltd and held all the shares when Ambery Ltd entered into a consultancy agreement with Jones to prepare a report with recommendations on strategies which Ambery Ltd should adopt. Jones duly prepared the report in November 1991. Jones subsequently invested in Ambery Ltd in November 1992 acquiring a fifty per cent interest in the company. In April 1993, Jones produced his final consulting report to Ambery Ltd addressing strategic issues within the company. The company, thereafter, failed and the Secretary of State commenced proceedings against Jones for a disqualification order arguing that Jones was a de facto director of Ambery Ltd. Pursuant to s 22(4) of the *Company Directors*

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84 Ibid at 363.

85 Ibid at 364.

86 [1999] BCC 336.

Disqualification Act 1986 (UK) the definition of (de facto) 'director' includes a 'person occupying the position of director, by whatever name called'.[87]

The arguments set out by the Secretary of State in support of the case of de facto director status included:

- 'Jones dealt with the appointment of the auditors of the company as though he were a director and held himself out as such.'[88] This was supported by a letter to the audit firm on company stationery which Jones signed 'Joint Managing Director'.
- Jones had dealings with the company's creditors.
- The bank mandate was amended whereby Jones became an authorised signatory on the Ambery Ltd bank account and subsequently signed cheques on its behalf.
- Jones negotiated price increases for certain products with Amberly Ltd's biggest customer.
- Jones acquired a fifty per cent interest in Ambery Ltd.

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[87] It must be recognised that the United Kingdom definition of de facto director is different to the current (Australian) *Corporations Act* s 9 definition of de facto director The United Kingdom definition is, however, virtually identical to the former Australian definition of de facto 'director' included in the *Companies Act* (prior to the *Companies Code*) which read as follows:

> 'Director' includes any person occupying the position of director of a corporation by whatever named called …

The introduction of the Companies Code in 1982 saw the definition of 'director' amended to 'includes any persons occupying or acting in the position of "director"' The word 'occupying' was subsequently removed with introduction of the Corporations Act in 2000. It is arguable that the words 'acting in the position of a director' encompass parties who occupy the position of director although not validly or never appointed a director. As such, the word 'occupying' was superfluous and was subsequently deleted from the definition. It is, therefore, submitted that the current Australian definition is broader than its United Kingdom counterpart. As such, if a party is at risk of falling within the United Kingdom definition of de facto director, it is arguable that the party may be at greater risk of falling within the Australian definition.

[88] [1999] BCC 336 at 341.

The district judge, at first instance, addressed each of the above arguments by the Secretary of State and was not satisfied that there was conclusive evidence to find that Jones was a de facto director. With respect to the altered bank mandate whereby Jones became joint signatory to the bank account, the district judge concluded 'I find that it was intended as a means of putting the brakes on the company's expenditure and of ensuring that he complied with bank overdraft limits'.[89] The district judge felt that Mr and Mrs Ambery were free to introduce controls which they thought were appropriate which encompassed Jones becoming a joint signatory on the bank account. The district judge also saw that the control achieved by Jones by becoming a joint signatory to the bank account could be further explained as Jones protecting his investment in the company as he had acquired a fifty per cent interest in Ambery Ltd. In a number of other matters which Jones dealt with, the district judge's position was whether those matters were consistent only with the activities of a director of Ambery Ltd. If it was not consistent only with the conduct of a director, it was then rejected. Furthermore, there was no evidence that Jones attended any board meetings and there was no evidence that the company's auditors regarded him as a director. The district judge held that Jones was acting under the terms of the consultancy agreement and was paid throughout as a consultant. As such, the district judge concluded that none of the findings led to the conclusion of de facto director status.

On appeal, Parker J of the Chancery Division conceded that the district court judgment was thorough and contained a detailed and careful examination of the evidence. 'In this appeal the Secretary of State does not challenge the primary findings of fact made by the district judge.'[90] The key facts of the case were therefore not in dispute. At issue was whether there was a mismatch between the findings of fact and the conclusion drawn by the district judge. Parker J then examined the various allegations made by the Secretary of State in support of a disqualification order on the basis of alleged de facto director status. The first was the holding out[91] by Jones in a letter on company notepaper in his capacity as 'joint managing director'. At issue in Jones's case was how cogent was the isolated incidence of holding out as a director in a company letter. Parker J accorded that the holding out as managing director had significance far greater than attributed by the district judge. With respect, notwithstanding that holding out as director is a significant indicator of de

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89 Ibid at 345.

90 Ibid at 342.

91 Although holding out as a director is not an essential element of the statutory definition of de facto director nevertheless, evidence of holding out as a director is a relevant and key factor in support of de facto director status in Australia; see *Mismtorn Pty Ltd (in liq) v Michael Yasseen* (1996) 14 ACLC 1,387 at 1,394.

facto director status, it must be recognised that in this case holding out as a director was an isolated incident, and as such, although relevant, it is submitted that it was not cogent evidence in support of de facto status. The second allegation by the Secretary of State related to the bank mandate of Ambery Ltd. Parker J concluded that the change to the bank mandate whereby Jones became an authorised signatory to the Ambery Ltd bank account had greater significance than what was accorded by the district judge. Parker J felt that this change to the bank mandate was a strong indicator that Jones assumed the role of director. It was, however, argued by Jones that the change to the bank mandate was consistent with Jones's position as holder of fifty per cent of the shares of Ambery Ltd and a desire to protect his substantial investment in the company. Parker J noted that protection of the investment begs the question. His Honour acknowledged that with only three shareholders (including Jones), Ambery Ltd could be regarded a quasi partnership. As such, when a significant shareholder becomes a joint signatory to the bank mandate in a quasi partnership, this supports the argument that, although the shareholder took an active part in running the affairs of the company albeit to protect their substantial investment, nevertheless, by doing so, this is a strong indicator of de facto director status.

A further allegation related to Jones's dealings with the company's creditors. The district judge dealt with this issue briefly and concluded '[w]hilst therefore I find that he did deal with creditors of the company, there is no cogent evidence that he dealt with them on a basis which was inexplicable other than that he was acting as a director of the company'.[92] Parker J considered that the district judge adopted a 'much too narrow an approach to the process of determining upon primary facts whether a respondent is not a de facto director of a company'.[93] His Lordship stated 'I would accept straight away that it is not a necessary inference from the fact that a respondent deals with creditors that he is acting as a de facto director, but once again, it seems to me that it is a clear indicator pointing in that direction and one of the matters which, looking at the respondent's conduct in the round, the court must take into account in reaching its decision.'[94] A further critical fact was that Jones negotiated prices with JCB, Ambery Ltd's overwhelmingly largest customer. While Parker J acknowledged that this in itself is not conclusive, it was a strong indicator of de facto director status, as this clearly was the company's most important client which one would expect director(s) to be involved in the price negotiations.

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92 [1999] BCC 336 at 346.

93 Ibid 350.

94 Ibid.

Parker J held Jones performed functions which would normally be performed by directors in smaller companies, namely, holding negotiations and altering the company's mandate with its bankers and carrying out negotiations with the company's creditors. His Lordship concluded '[i]n my judgment the primary facts in this instant case clearly establish conduct which amounts to a de facto directorship by Mr Jones in the affairs of the company'.[95] As stated, this was a significant decision as the court did not adopt a narrow approach to the statutory definition of de facto director. This case did not deal with a family member or friend or former director rendering assistance under the label 'consultant'. Jones was a management consultant 'operating through the medium of a company called Logicrite Ltd'.[96] The approach adopted by Parker J should be a strong warning to management consultants in Australia. His Honour clearly did not adopt a narrow view of the statutory definition of de facto director as evidenced by his Honour not requiring overwhelming evidence to find that the conduct of the management consultant amounted to de facto director status. As previously commented,[97] if consultants are at risk of falling within the United Kingdom definition of de facto director, then they are at greater risk of falling within the s 9 *Corporations Act* definition of de facto director as the Australian definition is broader than its United kingdom counterpart.

Conclusion

Australian companies are increasingly using the services of consultants in a wide range of business functions. This article has provided the first detailed examination of the potential risk to consultants of falling within the statutory definition of de facto director pursuant to s 9 of the *Corporations Act.* As part of this examination the article has reviewed the limited Australian and United Kingdom case authorities where consultants have been subject to claims of de facto director status. Notwithstanding that '[t]he authorities are not entirely consistent in defining de facto directors',[98] the review has revealed the statutory definition of de facto director potentially has a wide ambit. Key findings with respect to the risk of consultants falling within the statutory definition of de facto director include:

- A necessary requirement of acting as a director is to exercise 'what might be called the actual (and statutorily extended) top level of management functions'.[99] What is critical is whether the consultant is

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95 Ibid.

96 Ibid 340.

97 See footnote 87.

98 *Secretary of State for Trade and Industry v Hollier & Ors* [2006] EWHC 1804 (Ch) at para 64.

99 *Deputy Commissioner of Taxation v Austin* (1998) 16 ACLC 1,555 at 1,559.

involved 'in those affairs in respect one would expect a director to be involved'.[100]

- Performance of top level management functions 'is not necessarily a sufficient condition'[101] to establish de facto director status.

- Consultants performing top level management functions for major corporations seem to be at less risk of de facto director status as board delegation of these functions 'would appear inevitable'.[102] In contrast, consultants performing top level management functions to small companies would appear to be at greater risk of de facto director status as board delegation of these functions would not appear inevitable.

- Consultants performing top level management functions for companies are at significant risk of de facto director status if they participate in the board's decision making process rather than providing their recommendations and withdrawing to leave the decision for the board.[103]

- A consultant can be held to be a de facto director notwithstanding that 'he intended not to be a director'.[104]

- A consultant can be held to be a de facto director notwithstanding no solid evidence that the client company intended the consultant to be its director.[105]

- A consultant can be held to be a de facto director notwithstanding that the consultant did not hold themself out as a director.[106]

- 'Very little turns upon the extent to which … [a consultant] actually worked in the day to day operations of the business.'[107]

- A consultant can be held to be a de facto director although the consultant was not involved in the company's activities on a full time basis.[108]

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100 *Mismtorn Pty Ltd (in liq) v Michael Yasseen* (1996) 14 ACLC 1,387 at 1,395.

101 *Deputy Commissioner of Taxation v Austin* (1998) 16 ACLC 1,555 at 1,559.

102 Ibid.

103 See *Secretary for Trade and Industry v Elms* Unreported, 16 January 1997 cited in *Secretary of State for Trade and Industry v Hollier & Ors* [2006] EWHC (Ch) at para 70.

104 *Mistmorn Pty Ltd (in liq) v Michael Yasseen* (1996) 14 ACLC 1,387 at 1,394.

105 See *Deputy Commissioner of Taxation v Austin* (1998) 16 ACLC 1,555.

106 Ibid.

107 *Mistmorn Pty Ltd (in liq) v Michael Yasseen* (1996) 14 ACLC 1,387 at 1,394.

- The distinction between a director and a consultant is that the director is involved in the affairs of the company generally while a 'consultant is normally engaged to perform specific functions'.[109] A consultant's risk of de facto director status may increase the wider the terms of their engagement with respect to top level management functions of the client company.

- 'A person may be a de facto director even though that person does not have day to day control over the company's affairs and even though he or she acts as a director only in relation to part of the company activities.'[110]

- A director who resigns and becomes a consultant to the company who, nevertheless, continues to perform the same high level non executive tasks undertaken while as a director is clearly at risk of de facto director status.[111]

- '[C]lear and cogent evidence should be required'[112] before acceptance of de facto director status.

It must be acknowledged that all the cases examined related to smaller companies. Furthermore, all the parties subject to de facto director claims were non professional consultants, with the exception of the Western Australian litigation commenced against an accountant and the English Court of Appeal decision in *Re Tasbian Ltd (No 3)*[113] concerning a company doctor. It may, therefore, be argued that professional consultants who provide services to corporations appear to be at less risk of falling within the ambit of the statutory definition of de facto director than non professional consultants. The article has also highlighted the contrasting approach taken by some courts. It may be argued in *Natcomp Technology Australia Pty Limited v Graiche,*[114] a narrow approach was adopted with respect to the statutory definition of de facto director in contrast to the approach adopted in *Secretary of State for Trade and Industry*

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[108] See *Naomi Marble & Granite P/L v FAI & All Risks Management P/L* [1997] QSC 76 at 103 of 248 and *Mistmorn Pty Ltd (in liq) v Michael Yasseen* (1996) 14 ACLC 1,387 at 1,395.

[109] *Naomi Marble & Granite P/L v FAI & All Risks Management P/L* [1997] QSC 76 at 98 of 248.

[110] *Secretary for Trade and Industry v Elms* unreported, 16 January 1997, cited in *Secretary for Trade and Industry v Hollier & Ors* [2006] EWHC 1804 (Ch) at para at 73.

[111] See *Deputy Commissioner of Taxation v Solomon*; *Deputy Commissioner of Taxation v Muriwai* [2003] NSWCA 62.

[112] *In the Matter of Richstar Enterprises Pty Ltd v Carey* (No 5) [2006] FCA 684 (1 June, 2006) at para 54.

[113] [1992] BCC 358.

[114] (2001) 19 ACLC 1,117.

v Jones.[115] It is submitted that *Jones'* case was a significant decision for the following reasons. First, the management consultant was not a family friend, or relative, or former director rendering assistance to a company merely under the label 'consultant'. Secondly, the court did not adopt a narrow approach to the statutory definition of de facto director by requiring overwhelming evidence in support of de facto director status. The court held the consultant performed functions normally undertaken by the directors in a small company, and as such, found the consultant had assumed the role of director.

This article should be of particular interest to company practitioners, insolvency practitioners and liquidators. It has highlighted that consultants need to tread carefully when providing their services to corporate clients. On the one hand, consultants are at little risk if they provide their advice and leave it to the corporate client whether to act upon this advice. On the other hand, consultants who do not merely provide advice but who participate in the board's decision-making process are at risk of being held to be part of the company's governing structure, and as such, at real risk of de facto director status. These consultants may represent attractive potential targets for liquidators with respect to any breach of directors' duties including the significant duty to prevent insolvent trading.

[115] [1999] BCC 336.